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SUPREME COURT, U.S.

No. 83-6195

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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ERNEST JOHN DOBBERT, JR.,

Petitioner,

-v-

CHARLES D. STRICKLAND, et al.,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a trial judge's override of a jury's verdict against the death penalty violate the fifth, sixth, eighth, or fourteenth amendments?*/

2. Are the Florida standards governing the decision to override a jury's life verdict applied in such a broad and vague manner as to violate the fifth, sixth, eighth, or fourteenth amendments?*/

3. May a prosecutor procure juries "uncommonly willing to condemn a man to die" by the systematic use of peremptory challenges in case after case to exclude death scrupled jurors who could not be excluded for cause under Witherspoon v. Illiinois, 391 U.S. 510 (1968)?

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*/ These two questions are also presented in Spaziano v. Florida, No. 83-5596, cert. granted, 52 U.S.L.W. 3509 (Jan. 9, 1984).

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Petitioner, ERNEST JOHN DOBBERT, JR., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed October 19, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 718 F.2d 1518 (11th Cir. 1983), and is set out at pages 1a-10a of the Appendix.*/ Its order denying rehearing is noted at 720 F.2d 1294 (11th Cir. 1984).

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*/ Citations to the Appendix accompanying this petition are designated __a. Citations to the record below are designated as follows:

(a) Transcript of the trial in the state trial court as "T.T."

(b) Transcript of the first sentencing hearing as "S.T."

JURISDICTION

The judgment and opinion of the court of appeals were filed on October 19, 1982, and petitioner's timely petition for rehearing was denied on November 21, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth amendment to the Constitution, which provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

the sixth amendment to the Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury;

the eighth amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 921.141, Florida Statutes (1973), which is set out at pp. 11a-12a of the Appendix.

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*/ cont'd

(c) Transcript of the resentencing hearing as "S.H."

(d) Record on appeal of the resentencing as "S.R."

(e) Transcript of the hearing in the district court below as "H.T."

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of first degree murder of his daughter, Kelly Ann. After a separate sentencing hearing, the jury rejected the death penalty by a vote of ten to two and recommended that petitioner be sentenced to life imprisonment. The trial judge overrode the jury's advisory verdict and sentenced petitioner to death.

The Florida Supreme Court affirmed the conviction and sentence of death. Dobbert v. State, 328 So.2d 433 (Fla. 1976). Two justices dissented. One of those, Justice England, would have reversed the trial judge's override of the jury's verdict of life imprisonment. Id. at 444. This Court granted certiorari to determine three questions: (1) Whether the application of the Florida capital punishment statute, enacted after petitioner's crime, violated the ban against ex post facto laws; (2) whether its retroactive application violated the equal protection clause; and (3) whether petitioner was denied a fair trial as a result of prejudicial pretrial publicity. Dobbert v. Florida, 429 U.S. 939 (1976). The Court ruled against petitioner. Id., 432 U.S. 282 (1977). No issue raised in this petition was expressly presented for review, briefed, or argued in the 1977 certiorari proceeding.

After this Court's ruling, petitioner asked the Florida Supreme Court for relief under Gardner v. Florida, 430 U.S. 349 (1977). By order dated March 31, 1978, that court vacated petitioner's death sentence and remanded the case for resentencing. A new sentencing hearing was held before the trial judge on June 22, 1978. On June 30, 1978, the trial judge reimposed the death sentence. The Florida Supreme Court

affirmed on July 5, 1979. Dobbert v. State, 375 So.2d 1069 (1979). Certiorari was denied on June 9, 1980. Dobbert v. Florida, 447 U.S. 912 (1980).

Petitioner then joined the class of death sentenced prisoners who unsuccessfully petitioned the Florida Supreme Court for relief based on that court's consideration of extra-record psychological material in affirming death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

Petitioner's execution was set for February 2, 1982. Petitioner filed his motion to vacate sentence in state court on January 7, 1982. It was denied on January 28th. Dobbert v. State, 409 So.2d 1053 (Fla. 1982). On January 27, he had filed a federal habeas corpus petition in the Middle District of Florida. It was denied. Dobbert v. Strickland, 532 F. Supp. 545 (M.D. Fla. 1982). The Eleventh Circuit granted a stay pending appeal. Id., 670 F.2d 938 (11th Cir. 1982). The panel opinion on the merits rejected petitioner's claims. Id., 718 F.2d 1518 (11th Cir. 1983). Rehearing was denied on November 21, 1983. Id., 725 F.2d 1294 (11th Cir. 1984).

While petitioner's case was pending in the Eleventh Circuit, new evidence came to light that cast the propriety of his death sentence in serious doubt and led petitioner back to the state courts for further hearings. At trial, petitioner's thirteen-year-old son, Ernest John Dobbert, III ("John"), provided the only testimony regarding the death of Kelly Ann. He has since recanted that testimony in an affidavit and a sworn, videotaped statement. The statement reveals that Kelly Ann's death was, in fact, an accident and that John's prior adverse testimony was the product of intense fear of his father and emotional pressure from John's social worker at a time when John was undergoing bi-weekly hypnosis therapy and was under heavy medication with thorazine.[1/]

1/ A copy of the affidavit is attached at 13a-16a.

The Eleventh Circuit was informed of the pendency of the state court proceedings, but it nevertheless adjudicated the appeal. But see Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983) (Court declined to adjudicate habeas appeal when issues pending in state court could moot the case; case remanded and stayed pending exhaustion). A hearing on the new evidence was held in the Circuit Court of the Fourth Judicial Circuit for Duval County, Florida, on October 17 and 18, 1983; the matter is still sub judice in that court.

B. Facts Relevant to the Questions Presented

(1) Petitioner's Challenges to the Judge's Override of the Jury's Life Verdict:

Petitioner was charged with the murder of two of his children, Kelly Ann and Ryder,[2/] and the torture of two, John and Honore. The bulk of the testimony and evidence had little to do with the charge that petitioner murdered Kelly Ann, but instead described injuries to John, T.T. 1452-54, 1567-69, 1587-88, 1497-1600, 1618-19, 1624, 1626-27, 1648, 1650-51, 1996-2004, 2009-13, 2027-29, 2043, 2047-49, 2106, 2108, 2110-12, Ryder's illness and injuries, T.T. 1635-36, 1669-71, 1675-89, 1703-13, 1719-20, 1727-37, and police and other agency investigation of allegations of child abuse during the summer of 1971 (all of which satisfied the visitors that nothing unusual was afoot). T.T. 1532-34, 1541-42, 1545-51, 1803-10. There was also testimony about incidents of abuse of Kelly Ann months before her death, T.T. 1572-74, 1576, 1680, 1652-53, and statements by petitioner to others concerning the children's withdrawal from school, T.T. 1563, and absence from the home. T.T. 1612-13, 1637-40, 1757-60, 1812-13.

2/ The jury found petitioner guilty of second degree murder in the death of Ryder. This aspect of the case is not relevant to the issues raised in the present petition, which relate only to the propriety of the death sentence.

Neither the body of Kelly Ann nor Ryder was ever found. John's testimony provided the only evidence relating to Kelly Ann's death. John testified that she died on New Year's Eve, 1971. T.T. 2104, 2113. He described an incident the night before her death in which petitioner kicked Kelly Ann in the stomach with his foot. T.T. 2112-13. He also testified that his father choked Kelly Ann, that she stopped moving, T.T. 2114, that his father attempted mouth to mouth resuscitation, T.T. 2125-26, but that Kelly Ann's heart stopped. His father placed Kelly's body in a plastic bag and, after a day or two while her body remained in the attic, buried her. T.T. 2116.

Petitioner's post-arrest statements were introduced by the state. These statements described his problems in raising his children from January 1971, when his wife was arrested and jailed on worthless check charges, until April 1972, when John ran away and petitioner, realizing he could not care for his daughter, Honore, left her at the hospital with a note pinned to her clothes requesting that she be transported to his mother in Wisconsin. T.T. 2149, 2152-55; see also T.T. 1451-52. When the state rested, petitioner moved for a judgment of acquittal based on the insufficiency of the evidence. T.T. 2362-64. The motion was denied. T.T. 2367. The defense rested without presenting any evidence. T.T. 2372. The jury returned a verdict convicting petitioner of the first degree murder of Kelly Ann. T.T. 2637.

At the penalty phase, the state presented the reports of the court-appointed psychiatrists who had examined petitioner for the purposes of determining his competency to stand trial and his sanity at the time of the offense, as measured by the M'Naughton standard. S.T. 20. The reports concluded

that petitioner was competent and sane. S.T. 21.

Petitioner presented several mitigating factors to the jury, which went unrebutted by the state. They included: (1) that petitioner had been steadily employed from age 16 until a short time before his arrest, a total of about 20 years, T.T. 2161; (2) that he attempted to provide financially for his wife and children, sending his wife presents after she had been sent to jail, S.T. 206; (3) that he offered no resistance to police officers when arrested, T.T. 2083; (4) that he delivered his youngest daughter to a hospital to be sent to her grandmother because he feared for her safety if he were arrested, S.T. 315; T.T. 2291-92; and (5) that he had taken his son Ryder to the hospital when Ryder became ill. S.T. 306; T.T. 2208. These were in addition to the facts before the jury indicating that petitioner had no history of violence or other criminal behavior outside his relationship with his wife and children and suggesting, based on his post-arrest statements concerning his emotional state and the very nature of his acts, that petitioner suffered from significant emotional disturbance.

The jury verdict, signed by ten of its twelve members, read:

> We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find:
>
> 1. Sufficient aggravating circumstances do not exist to justify a sentence of death.
>
> 2. Sufficient mitigating circumstances do exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.
>
> 3. Based on those considerations, the defendant should be sentenced to life imprisonment.

S.T. 71. The trial judge overrode that verdict and sentenced petitioner to death. S.T. 136.

At the sentencing hearing held on the Gardner remand, petitioner presented the testimony of his two sisters, his brother-in-law and his mother, all of whom corroborated his own testimony that he had been physically abused and psychologically humiliated by his own father from the time he was a child until the time his father died in 1969, when petitioner was an adult. S.H. 133, 157-162, 177-183, 200-03, 235. The report of Dr. David Walters, an expert in the child abuse syndrome, was submitted. The report was based on petitioner's family history and the reports of the doctors who examined petitioner before trial. It concluded that petitioner was a victim of the abusing parent syndrome, in which an abused child grows up to be an abusing parent because of the psychological damage inflicted in childhood. S.H. 248. A textbook describing the syndrome was admitted into evidence. S.H. 127. Letters from petitioner to his wife, written during the period of his abuse of his children, were admitted as evidence of his emotional distress at the time. S.H. 371. Finally, petitioner testified about the unbearable stress he felt after his wife was sent to jail, his inability to cope with his situation, the abuse he inflicted on his children, and his pitiful attempts to care for their wounds after he hurt them. S.H. 276-369.

The state presented no additional evidence. The trial court again sentenced petitioner to death, based on written findings made part of the record. S.R. 102.

The latter findings of the trial judge, Judge R. Hudson Olliff, were identical to his original findings in all material respects. On both occasions, he canvassed the statutory mitigating circumstances and found none. He did not state whether he found any nonstatutory mitigating factors.

He merely concluded that: "There are no mitigating circumstances existing -- either statutory or otherwise -- which outweighs [sic] any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death." State v. Dobbert, Case No. 73-5068, Slip op. at 12 (April 12, 1974); id., Slip op. at 22 (June 30, 1978). The judge then reviewed the statutory aggravating circumstances and found four: (1) that, although "[t]he defendant was not imprisoned at the time of the murder," the "under sentence of imprisonment" circumstance applied, 1974 op. at 13; 1978 op. at 23; (2) that the defendant created a great risk of harm to many persons, 1974 op. at 15; 1978 op. at 26; (3) that the crime was committed to avoid arrest, 1974 op. at 16, 1978 op. at 28; and (4) that it was heinous, atrocious, and cruel. 1974 op. at 19; 1978 op. at 31.[3/] The 1978 findings are repeated almost verbatim from the 1974 opinion.[4/]

Three salient points relating to the jury override question should be noted. First, the 1974 opinion demonstrates that the trial judge applied disparate standards in reviewing the jury's verdict regarding aggravating and mitigating circumstances. With regard to aggravating factors, the

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3/ The 1974 opinion found an additional aggravating circumstance, which the judge abandoned in the 1978 opinion. In 1974, the judge found that Mr. Dobbert had been convicted of violent felonies. 1974 op. at 14-15. This was based on information in the presentence report that indicated convictions for assaults on the children but did not specify whether they were felonies or misdemeanors. Judge Olliff held that the distinction was irrelevant, despite the fact that the statutory circumstance specifies violent felonies. Id. at 15. On the Gardner remand, Mr. Dobbert established that the prior conviction were misdemeanors. The judge no longer considered these convictions as a separate statutory aggravating factor, 1978 op. at 25, but he did consider them as the basis for his improper finding of the "under sentence of imprisonment" factor, id. at 23, later repudiated by the Florida Supreme Court.

4/ The greater length of the 1978 opinion is due to the judge's summary of the additional evidence adduced on the Gardner remand.

opinion reviews "the facts brought out in trial and the presentence investigation and applies them to the elements of aggravation which were considered by the Jury in arriving at their Advisory Verdict." 1974 op. at 12 (emphasis added). But, with regard to mitigating evidence, the trial judge did not consider the jury's findings. To the contrary, he "summarized the facts as brought out in the trial and the presentence investigation report and applied them to each element of aggravation and/or mitigation where such elements are applicable." Id. at 2 (emphasis added).5/

Second, this disparate standard was critical to the judge's override of the jury verdict. The jury made an explicit finding that mitigating circumstances existed. S.T. 71. The judge found none and failed to explain this discrepancy. His opinion suggests one or two explanations: (1) The jury may have found nonstatutory mitigating factors. In contrast, the judge did not state whether he found any nonstatutory mitigating considerations. It is possible that, despite the principle of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), the trial judge failed to consider the mitigating evidence presented, and that that accounts for the override. (2) The jury may have found one or more of the statutory mitigating factors relating to the defendant's mental condition -- that the defendant was under the influence of extreme mental and emotional disturbance

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5/ The record makes clear that in 1974 Judge Olliff did not properly apprehend the role of the jury's sentencing verdict. In the instructions to the jury at the guilt phase of petitioner's trial, he told them that: "The Court is not required to follow the advice of the jury as to the advisory sentence...," T.T. 2255, and that:

> Just as the determination of guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of punishment, within the limits prescribed by the law, rest solely with the Court.

T.T. 2254.

and that his capacity to conform his conduct to the law was substantially impaired. The trial judge rejected these circumstances based on the testimony by the court-appointed psychiatrists that the defendant was competent to stand trial and not insane under the M'Naughton standard. 1974 op. at 5 and 7; 1978 op. at 21.[6/] It is clear, however, that competency to stand trial and sanity under the M'Naughton test are not the same as the absence of emotional disturbance or of substantially impaired capacity. The Florida Supreme Court has so held. Ferguson v. State, 417 So.2d 631, 638 (Fla. 1982); Ferguson v. State, 417 So.2d 639, 645 (Fla. 1982); Mines v. State, 390 So.2d 332, 337 (Fla. 1980).

Third, the application of the test of Tedder v. State, 332 So.2d 908 (Fla. 1975), governing jury overrides was at best flawed. The 1974 opinion did not discuss the jury override question; the judge merely stated his decision regarding the relative weight of aggravating and mitigating circumstances. Id. at 19. This was consistent with his understanding that his sentencing decision was unconstrained by the jury's life verdict, that questions of punishment "rest solely with the Court." T.T. 2254 (see n. 5, supra). On appeal, the Florida Supreme Court did not even cite Tedder, which had been decided two months before Dobbert. See Dobbert, 328 So.2d at 441; id. at 444 (England, J., dissenting). On remand, Judge Olliff merely quoted the Tedder standard, 1978 op. at 32, and said: "That it is suggested that this case has fully met this standard." Id. at 33. He did not address the factual

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6/ On the issue of emotional disturbance, the judge relied on the failure of the doctors to report any, 1974 op. at 5; 1978 op. at 12, despite the fact that their examinations were for a more circumscribed purpose. He also emphasized the doctors' findings on competence and sanity. 1974 op. at 4-5; 1978 op. at 12. On diminished capacity, the judge was yet more specific: "There is no mitigating circumstance under this paragraph because the expert opinions agree that he was mentally competent and able to understand the nature, quality and wrongfulness of his acts at the time of the crime...." 1974 op. at 11-12; 1978 op. at 21.

discrepancies between the jury's finding of mitigating circumstances and his finding that there were none. The Florida Supreme Court affirmed "in light of the totality of the circumstances...." Dobbert, 375 So.2d at 1071. It did so although it found that the trial judge had misapplied two out of the four aggravating circumstances, those concerning prior violent felony convictions and great risk of harm to many persons. Id. at 1070. Normally, a jury override coupled with the misapplication of statutory aggravating circumstances would result in a remand for resentencing since "in the absence of the improperly found aggravating circumstances the Tedder test could not be met." Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134, 1147-48 (1983) (plurality opinion); see, e.g., Lewis v. State, 398 So.2d 432, 439 (Fla. 1981); Williams v. State, 386 So.2d 536, 543 (Fla. 1980).

In federal habeas corpus, these claims were rejected on the authority of dicta in Proffitt v. Florida, 428 U.S. 242, 252 (1976), and Dobbert v. Florida, 432 U.S. at 295-96. Dobbert v. Strickland, 718 F.2d at 1523; id., 532 F. Supp. at 556.

(2) Petitioner's Attack upon the Systematic Use of Peremptory Challenges to Exclude Death Scrupled Jurors not Otherwise Excludable under Witherspoon v. Illinois:

Petitioner's evidence shows that the prosecutor systematically exercised his peremptory challenges against those death-scrupled jurors who could not lawfully be excused for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968). It is based on a study conducted by Professor Bruce J. Winick of the University of Miami School of Law. Professor Winick studied the use of peremptory challenges in death cases

by the prosecutors in the Fourth Judicial Circuit, where petitioner was tried. The study included the period of petitioner's trial and focussed on his case and approximately thirty-four others. The voir dires of 1103 potential jurors were examined. Of those 1103, 516 were excused for cause for health reasons, because of specific biases against the defendant or the state, because they were unalterably and unequivocally opposed to the death penalty and thus qualified for exclusion under Witherspoon, or as a result of the defense's peremptory challenges. Of the 587 remaining people, 51 were classified as scrupled because they expressed on voir dire some opposition to or difficulty with the death penalty.

Just over 13% of the original 1103 potential jurors expressed some opposition to the death penalty. After the Witherspoon and other exclusions for cause and the exercise of defense peremptories, 8.7% of the remaining 587 potential jurors were scrupled. The prosecutor's use of his peremptory challenges winnowed this down to only about 3% of the final jurors and alternates.

Overall, the prosecutor used his peremptories to challenge 32% of the 586. His use of peremptory challenges against non-scrupled jurors was roughly proportionate to this pattern: 28% of the non-scrupled jurors were excluded. But a significant difference emerges when one views the prosecutor's challenges to the scrupled jurors: 74.5% of those jurors were excluded by the prosecutor's use of peremptories. H.T. 40. For actual jurors, as opposed to alternates, the figure rises to 78.25%. H.T. 41. See generally, Winick,

Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich.L.Rev. 1, 26-39 (1982).[7/]

Professor Winick and Doctor Howard Gitlow, who served as statistician for the study, testified that there were only two chances in a billion that the exclusions were not related to the jurors' scruples, the equivalent of flipping a legitimate coin "heads up" twenty-nine times in a row. Expressed in standard deviations, the proportion of scrupled jurors not excludable under Witherspoon who survived the prosecution's peremptory challenges was between 7.23 and 7.58 standard deviations less than what would be predicted. H.T. 41.

In petitioner's case, the prosecutor's use of his peremptory challenges to remove scrupled jurors was complete. All 12 of the scrupled potential jurors who remained after the challenges for cause and the defense peremptories were excluded by the prosecutor.[8/]

The state courts rejected petitioner's challenge to the systematic exclusion of these Witherspoon nonexcludables. The Florida Supreme Court devoted more than half of its opinion to a discussion and decision of this claim on the merits. Dobbert v. State, 409 So.2d at 1055-57. It further ruled that, although it found no constitutional violation, there was no prejudice. Id. at 1057-58. In between these discussions,

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7/ The Michigan Law Review article is the published version of the study discussed in the text. It differs from the testimony below only in that it considered the voir dires of 13 additional potential jurors. Its conclusions are in all respects congruent with the testimony below.

As discussed in the article, the study also considered the possible effects of twenty-nine potential confounding variables. Id. at 29-34. Analysis of the variables for which there was adequate information failed to account for the gross disparities shown. Id. at 36-39.

8/ The Florida Supreme Court noted that petitioner had himself exercised two peremptory challenges to exclude scrupled jurors and that he had acquiesced in the dismissal of one for cause. Dobbert v. State, 409 So.2d at 1057. This is irrelevant to the issue of the prosecutor's pattern of peremptory challenges: all these potential jurors were excluded before the prosecutor had a chance to use his peremptories. Of the pool presented to the prosecutor, all scrupled jurors were removed.

it devoted two paragraphs to noting that the issue had not been preserved by contemporaneous objections. Id. at 1057.

The federal district court held that: (1) the claim was barred by procedural default; (2) petitioner had failed to demonstrate cause or prejudice; and (3) the claim failed to state a ground for relief. 532 F. Supp. at 561-62. The court of appeals affirmed on all three grounds, except that it did not discuss the question of prejudice. 718 F.2d at 1524-25.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER A TRIAL JUDGE'S OVERRIDE OF A JURY'S FACTUALLY BASED DECISION NOT TO IMPOSE THE DEATH PENALTY VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Under Florida law, Section 921.141(3), Florida Statutes, the trial judge may impose a sentence of life imprisonment or death "notwithstanding the recommendation of a majority of the jury." This case presents the question whether a trial judge may overrule a jury's decision in favor of life when the jury's decision is based upon findings of fact required by statute reached after a penalty trial analogous in all material respects to a trial on the issue of guilt or innocence.

The Court has already granted certiorari in Spaziano v. Florida, No. 83-5596, cert. granted, 52 U.S.L.W. 3509 (Jan. 9, 1984), which presents the same essential question for review. Accordingly, petitioner will not repeat the reasons for granting the writ marshalled there. Petitioner submits that it would be appropriate for the Court to grant the writ in this case and consider it together with Spaziano.

At the outset, petitioner acknowledges that the Court has adverted to a Florida trial judge's power to override the jury's sentencing recommendation in earlier cases under the 1973 Florida statute, including petitioner's own case. Dobbert v. Florida, 432 U.S. at 294-96; Proffitt v. Florida,

428 U.S. at 252. But in none of these cases was the constitutionality of the jury override procedure at issue. Proffitt's jury recommended death. 428 U.S. at 246. In Dobbert, the Court held only that, given the protections of Tedder, "defendants are not significantly disadvantaged vis-a-vis ... the old statute." 432 U.S. at 296. While the Proffitt and Dobbert Courts clearly assumed the constitutionality of the basic jury override power under the Tedder standard, "[t]hese observations, though weighty and respectable, are nevertheless dicta...." Duncan v. Louisiana, 391 U.S. 145, 155 (1968). The issue was not examined closely in the Proffitt or Dobbert opinions nor in the briefs and arguments before the Court. "Perhaps because the right to jury trial was not directly at stake, the Court's remarks about [the override procedure] took no note of past or current developments regarding jury trials, did not consider its purposes and functions, [and] attempted no inquiry into how well it was performing its job...." Duncan, 391 U.S. at 155.

The Spaziano petition discusses the "purposes and functions" of juries in capital sentencing and why they should be interposed between the defendant and the life or death decision. Petitioner will address the relevant developments since Proffitt and Dobbert and why consideration of this case will help the Court to determine how well the override procedure has performed in fact.

The critical development is the decision in Bullington v. Missouri, 451 U.S. 430 (1981). There, the Court held that "[t]he values that underlie" the Fifth Amendment's double jeopardy clause "are equally applicable when a jury has rejected the State's claim that the defendant deserves to die...." Id., 451 U.S. at 445. As a result, it barred consideration of the death penalty on a retrial after the original jury had decided for life.

Every major feature of the Missouri penalty trial relied on in Bullington is also present under the Florida procedure: the clear-cut choice between only two sentencing alternatives; the requirement that the jury base its choice upon the evidence, guided by detailed legal standards; the requirement that the state prove the proffered aggravating circumstances beyond a reasonable doubt; the presentation of evidence by both sides; opening and closing arguments by counsel; jury deliberations; and a formal verdict. Compare Bullington, 451 U.S. at 438 and n. 10, with § 921.141(1) and (2), Florida Statutes; Florida Rule of Criminal Procedure 3.76; State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

The chief distinction between Bullington and the Florida procedure is that a Missouri jury's life decision is made binding by statute while a Florida jury's verdict for life imprisonment is denominated "advisory." But the language and reasoning of Bullington suggest that this distinction cannot control. Under Florida law, the state is required to present its factual case on sentencing in a jury proceeding that has all the indicia of a trial. But if it fails, it gets a second bite at the apple before the judge; indeed, it is free to adduce additional information in the form of a pre-sentence report, as occurred in this case. But cf. Presnell v. Georgia, 439 U.S. 14 (1978). "By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, [Florida] explicitly requires the jury to determine whether the prosecution has 'proved its case.'" Bullington, 451 U.S. at 444 (emphasis in original); see § 921.141(2), Florida Statutes. Mr. Dobbert's jury made that determination, finding that: "Sufficient aggravating circumstances do not exist to justify a sentence of death." S.T. 71. "Having received 'one fair opportunity to offer whatever proof it could assemble,'... the State

is not entitled to another." Bullington, 451 U.S. at 446 (quoting Burks v. United States, 437 U.S. 1, 16 (1978)).

This case illustrates how unreliably the override procedure performs in fact. The jury found insufficient aggravating circumstances to justify a death sentence and found sufficient mitigating circumstances to outweigh the aggravating circumstances that did exist. S.T. 71. In overriding these fact-based determinations, the trial judge failed to deal with either determination in a reasoned manner. Judge Olliff found four aggravating factors,[9/] but the Florida Supreme Court rejected two. Dobbert v. State, 375 So.2d at 1070. Judge Olliff found no mitigating factors whatsoever, but he failed to articulate how the jury's finding of mitigating factors was so erroneous that, in the terms of the Tedder standard, "virtually no reasonable person could differ." Tedder, 322 So.2d at 910. Indeed, he rejected statutory mitigating factors relating to the defendant's mental state based on a logic expressly repudiated by the Florida Supreme Court in other cases. See Ferguson, 417 So.2d at 636; id. at 645; Mines, 390 So.2d at 337. He made no finding as to whether there were any nonstatutory mitigating factors, although such factors were presented to the jury and are often determinative under Florida law. See, e.g., Lewis, 398 So.2d at 439 ("the jury ... is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment"); Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978) (mitigating factor of gainful employment outweighed aggravating circumstances).

9/ Judge Olliff found five originally, but after the hearing on the Gardner remand he changed his mind on one.

The problems with the jury override in this case demonstrate why a defendant should be entitled to "the common-sense judgment of a jury [over] the more tutored but perhaps less sympathetic reaction of the single judge." Duncan v. Lousiana, 391 U.S. at 156. It confirms the wisdom of the framers' "reluctance to entrust plenary powers over the life ... of the citizen to one judge." Id. This particular case illustrates that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created...." Id. at 157 (citing H. Klaven, Jr., and H. Zeisel, The American Jury (1966)).

Together with Bullington, these considerations cast serious doubt upon the constitutionality of the practice of overturning a jury's life decision reached after a full penalty hearing and based upon findings of fact under instructions of law given by the court. The issue should be determined on its merits in this case.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE FLORIDA STANDARDS FOR THE OVERRIDE OF A JURY'S LIFE VERDICT WERE APPLIED IN SO BROAD AND VAGUE A MANNER AS TO VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The petition in Spaziano lays out the conceptual reasons why the writ should be granted on this issue. Even a system that is constitutionally adequate may go awry in a particular case. Godfrey v. Georgia, 446 U.S. 420 (1980). The discussion in Point I above documents some of the ways in which the override of the jury's life verdict went awry here. Three considerations should especially be noted.

First, the Tedder standard was not applied in this case in a careful or thoughtful manner. Neither of the judge's sentencing opinions articulated where or why he departed from the jury's findings. The first opinion was rendered before Tedder was decided; the second discussed Tedder in only the most cursory fashion. Nor was this cured on appeal. On the first appeal, the Florida Supreme Court failed to discuss Tedder, which it had already decided. The second time around, it merely cited Judge Olliff's "recitation" that Tedder was met and affirmed it in an equally cursory discussion. 375 So.2d at 1071. It failed to resolve any of the obvious conflicts between the jury's factual determinations on aggravating and mitigating circumstances and the judge's, including his error in finding two of four aggravating circumstances. Compare Lewis, 398 So.2d at 439; Williams, 386 So.2d at 543.

Second, since the time of petitioner's sentence and appeals, the Florida Supreme Court has acknowledged the infirmities of the jury override procedure and has toughened and restricted it. In Lewis, it explicitly recognized what Judge Olliff in this case clearly did not, that the jury's verdict may reflect a determination that nonstatutory mitigating circumstances exist. 398 So.2d at 439. It therefore held that, when the trial judge misapplies aggravating circumstances, the jury's finding on mitigating circumstances cannot be overridden by the judge. Id.

Moreover, the Florida Supreme Court's most recent decision in an override case recasts the override standard in a way that points up the constitutional infirmity of the original Tedder standard. As articulated in Tedder and applied at the time of petitioner's sentencings and direct appeals, that standard focussed only on the reasons for

imposing death: that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ...." Tedder, 332 So.2d at 910 (emphasis added). Lewis recognizes the other half of the equation: that the jury is entitled to weigh matters reasonably relevant to mitigation. A jury override standard that does not take that into account is constitutionally infirm because the death penalty can be imposed only if the "process ... permit[s] consideration of the 'character and record of the individual offender...' in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.'" Lockett, 438 U.S. at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). As the override procedure is now applied by the Florida Supreme Court, "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

The Richardson standard recognizes that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976). It does "not countenance the denigration of the jury's role..., reflecting as it does the conscience of the community...." Richardson, 437 So.2d at 1095. Under such a standard, the jury override in this case is plainly flawed. There was ample evidence to support the jury's finding that: "Sufficient mitigating circumstances do exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a death sentence." S.T. 71. There was evidence to support a jury finding of nonstatutory mitigating circumstances. Moreover, there was ample evidence to support a jury finding of the statutory mitigating circumstances pertaining to Mr. Dobbert's

emotional and mental state, which the judge ignored because of his reliance on irrelevant competency and sanity standards.

Third, the Court's observations in dicta in the prior Dobbert decision, 432 U.S. at 296 n. 9, concerning the jury override in this case should not be controlling for two reasons. The Court's 1977 opinion concluded "that it was the nature of the crime ... that resulted in the death sentence in this case." Id. But precisely because this conclusion correctly perceived the basis for the judge's sentence, it replicated the infirmity in the Tedder standard noted above: an override based solely on the strength of the aggravating factors ignores the constitutionally required consideration of mitigating factors. Moreover, the Court's 1977 conclusion was based on the now familiar language in Judge Olliff's sentencing opinions recounting his experiences in the criminal justice system and as a paratrooper in World War II. See Barclay v. Florida, 77 L.Ed.2d at 1164 and n. 12 (Marshall, J. dissenting). The personal experience of a trier of fact may be uniquely relevant to the determination whether a particular crime is heinous, atrocious, and cruel. Id. at 1144 (plurality opinion). And it may properly be considered at the third, discretionary stage of the sentencing process. Id. at 1157 n. 18 (Stevens and Powell, JJ., concurring). But it is plainly irrelevant to a determination whether "virtually no reasonable person could differ" with the death sentence, Tedder, 322 So.2d at 910, or whether "no reasonable basis exists for the [jury's] opinion." Richardson, 437 So.2d at 1095. Reliance on one's unique personal experience to override a jury verdict of life is the very antithesis of a determination that no reasonable person could differ;

in this case, for example, it presupposes that all reasonable jurors have had the same personal experience as Judge Olliff.[10/] It certainly has no bearing on whether there is a reasonable basis in the record for the jury's verdict.

The Court should grant the writ to consider this case together with Spaziano and determine whether the Tedder standard has been too loosely applied here to comport with constitutional requirements.

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A PROSECUTOR MAY "STACK" THE JURY BY THE SYSTEMATIC USE OF PEREMPTORY CHALLENGES TO EXCLUDE DEATH SCRUPLED JURORS WHO COULD NOT BE EXCLUDED UNDER WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968)

The Court has repeatedly "held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Adams v. Texas, 448 U.S. 38, 43 (1980). A jury so winnowed cannot "express the conscience of the community." Witherspoon, 391 U.S. at 519. It lacks impartiality, id. at 518, for "[t]he State ... has stacked the deck against petitioner." Id. at 523.

It matters little whether the state has stacked the jury by operation of its substantive law of juror qualification or whether it has deliberately done so by the systematic manipulation of its peremptory challenges; the jury is no less "organized to return a verdict of death." Witherspoon, 391 U.S. at 521-22. Petitioner is still deprived of a fair cross section of the community. Although peremptory challenges

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10/ This confirms the wisdom of leaving the life or death determination in the hands of the jury. "Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the ... eccentric judge." Duncan v. Louisiana, 391 U.S. at 156.

are valuable precisely because they need not be justified, Swain v. Alabama, 380 U.S. 202, 220 (1965), the Court should grant the writ to determine whether they may be abused to accomplish what, under Witherspoon and Adams, the Constitution plainly forbids. See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis 81 Mich.L.Rev. 1 (1982).

The courts below ruled against petitioner on the alternate ground of procedural default. Although the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), does not apply when the state court did not enforce its procedural rule but addressed the claim on the merits, Ulster County Court v. Allen, 442 U.S. 140, 152 (1979), the court of appeals below applied a Sykes bar because of the lack of clarity of the Florida Supreme Court decision in the alternative, relying on Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.) cert. denied, 444 U.S. 868 (1979).

The court of appeals erred in applying the Sykes bar for two reasons. First, the Florida Supreme Court opinion here cannot be read as a definitive invocation of a state procedural default rule. Its waiver discussion is barely more than a passing reference in an opinion that discusses the merits extensively, both before and after the "invocation" of the procedural bar. Indeed, the discussion of the merits -- including both the question of violation and resulting prejudice -- constitute three full pages of a less than five page opinion. Dobbert v. State, 409 So.2d at 1055-57 and 1057-58. Under these circumstances, when the state court has clearly addressed the merits of the constitutional claim, "a federal court implies no disrespect for the State by entertaining the claim." Ulster County Court, 442 U.S. at 154.

Second, petitioner meets the Sykes "cause and prejudice" test. The courts below held that there was not cause since Swain and Witherspoon were decided years before and the tools to construct the claim already existed. But this misses the point. Petitioner's trial in early 1974 was one of the first to be held in that district under the post-Furman statute enacted by Florida in 1973. It was at the beginning of the pattern of abuse of peremptory challenges demonstrated by the testimony below. Petitioner lacked the factual tools to construct the claim, not because the study had not yet been done as argued by the Eleventh Circuit, 718 F.2d at 1525, but because the pattern was not yet discernible.[11/] Indeed, had petitioner raised a contemporaneous objection at the time of voir dire based on the confluence of Witherspoon and Swain, he would surely have been told that he could not prevail because he had failed to show systematic exclusion in case after case as required by Swain. 380 U.S. at 223.[12/]

Finally, there was prejudice. Neither the fact of the jury override nor the jury's majority vote for life establish otherwise. In Witherspoon itself, the Court held that "nothing in our decision turns on whether the judge is bound to follow such [a jury] recommendation." 391 U.S. at 518 n. 12. The fact that the jury voted for life by a 10 to

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11/ Swain itself has been criticized for exactly this reason: "because it provides no remedy for the first victims of discrimination in a particular jurisdiction, no matter how plain the facts might be in the particular case." McCray v. Abrams, 83 C 4406, Slip op. at 8 (E.D.N.Y. Dec. 19, 1983) (citing United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir.), cert. denied, 449 U.S. 878 (1980)).

12/ The Florida Supreme Court noted the fact that petitioner himself exercised two peremptories to exclude scrupled jurors and that he acquiesced in the excusal for cause of another. Based on this, it surmised that he may have had tactical reasons for not objecting to the others. 409 So.2d at 1057. But the fact that petitioner expressed his desire or acquiescence in some cases implies just the opposite, that he was not satisfied with the excusals of the others. He did not express an objection simply because he had no factual basis upon which to object under Swain.

2 vote does not remove the prejudice to petitioner; it is more than likely that a unanimous vote for life would have been persuasive to the trial judge and prevented an override: viz., (1) Judge Olliff has cited the jury's divided vote as a reason justifying an override in one case, see Barclay v. Florida, ____ U.S. __ __, 77 L.Ed.2d 1134 (1983); and (2) the only case known to petitioner in which Judge Olliff has sentenced a capital defendant to life is one where the jury's life recommendation was unanimous and that fact was conveyed to him. State v. Grant, No. 82-140 CF (Division S, Fourth Judicial Circuit).

Attention has recently been focussed on the question of the improper use of peremptory challenges by the prosecution, five Justices having expressed their opinion that the issue should be reexamined. McCray v. New York, ____ U.S. ____, 77 L.Ed.2d 1322 (1983). Although McCray and its companion cases involved exclusions based on race, "the same constitutional claims may also apply to the exclusion of other identifiable groups." Id. at 1323 n. (Stevens, Blackmun, and Powell, JJ., opinion respecting the denial of cert.).[13/] "In light of the special emphasis [the Court] has placed on providing an impartial jury in capital cases, ... review of the use of peremptory challenges in capital cases is particularly appropriate." McCray, 77 L.Ed.2d at 1326 n. 8 (Marshall and Brennan, JJ., dissenting from the denial of cert.).

13/ Recent social science data establishes that death scrupled jurors are an identifiable group in the community with experiences and attitudes not represented by nonscrupled jurors. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); Keeten v. Garrison, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Ernest John DOBBERT,
Petitioner-Appellant,

v.

Charles G. STRICKLAND, Jr., et al.,
Respondents-Appellees.

No. 82-5121.

United States Court of Appeals,
Eleventh Circuit.

Oct. 19, 1983.

Appeal was taken from a judgment of the United States District Court for the Middle District of Florida, Susan H. Black, J., 532 F.Supp. 545, denying petitioner habeas corpus relief. The Court of Appeals held that: (1) trial court's imposition of death sentence and Florida Supreme Court's affirmance thereof were not arbitrary; (2) trial judge's imposition of death

sentence following jury's advisory life verdict was not unconstitutional; (3) record demonstrated that both order of trial court and decision of state Supreme Court reflected consideration of all mitigating evidence; (4) state's alleged use of peremptory challenges to systematically exclude death-scrupled jurors was foreclosed from consideration in federal forum due to petitioner's failure to object at trial to prosecutor's use of peremptory challenges; and (5) United States Supreme Court decisions addressing, respectively, use of challenges for cause to exclude death-scrupled jurors and use of peremptory challenges to exclude black jurors has not been extended to state's alleged use of peremptory challenges to systematically exclude death-scrupled jurors.

Affirmed.

Wisdom, Senior Circuit Judge, sitting by designation, dissented and filed opinion.

See also, 11 Cir., 670 F.2d 938.

1. Homicide ⇐354

Trial court's imposition of death sentence for first-degree murder upon finding four aggravating circumstances, and Florida Supreme Court's affirmance thereof, after ruling that there was insufficient evidence to support two of the four circumstances but upholding remaining two aggravating circumstances, were not arbitrary, where sentencing judge found no mitigating circumstances, and did not view as aggravating any constitutionally protected conduct.

2. Criminal Law ⇐1208.1(6)

Trial judge's imposition of death sentence following jury's advisory life verdict was not unconstitutional per se.

3. Homicide ⇐354

Record demonstrated that both order of trial court sentencing petitioner to death for first-degree murder and decision of Florida Supreme Court affirming the sentence reflected consideration of all mitigating evidence put on by petitioner, statutory and nonstatutory.

4. Habeas Corpus ⇐25.1(1)

Procedural default bars consideration of merits of issue in federal court only when state court itself applies procedural default rule; where state court waives procedural requirement and decides case on merits, federal review of constitutional claim is not barred.

5. Habeas Corpus ⇐25.1(1)

Where state court clearly and correctly applies procedural default rule, federal court must abide by state court's decision even though state court discusses merits as alternate ground for rejecting claim.

6. Habeas Corpus ⇐25.1(4)

Where habeas petitioner failed to object at trial to prosecutor's use of peremptory challenges as excluding death-scrupled jurors from panel in violation of his rights to due process and to fair and impartial jury drawn from cross section of community, issue was foreclosed from consideration in federal habeas forum. U.S.C.A. Const. Amends. 5, 14.

7. Habeas Corpus ⇐25.1(1)

Contemporaneous objection rule is constitutional with regard to challenges of composition of jury panels.

8. Jury ⇐33(5.1)

United States Supreme Court cases addressing, respectively, use of challenges for cause to exclude death-scrupled jurors and use of peremptory challenges to exclude black jurors, have not been extended to situation of state's alleged use of peremptory challenges to systematically exclude death-scrupled jurors.

9. Homicide ⇐232

Evidence was sufficient to prove element of premeditation to sustain habeas petitioner's conviction for first-degree murder.

Patrick D. Doherty, Gross & Doherty, Clearwater, Fla., for petitioner-appellant.

Carolyn Snurkowski, Asst. Atty. Gen., Tallahassee, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and TJOFLAT, Circuit Judges, and WISDOM *, Senior Circuit Judge.

PER CURIAM:

This is an appeal by a Florida state prisoner from a federal district court's denial of habeas corpus relief in a capital case. Petitioner Ernest John Dobbert was convicted of first degree murder of his daughter. Contrary to the recommendation of the advisory sentencing jury, the trial judge sentenced him to death. In the precise words used in his petition for a writ of habeas corpus, Dobbert asserted the following grounds in the federal district court:

1. insufficiency of the evidence;
2. refusal to consider relevant mitigating circumstances;
3. striking aggravating circumstances;
4. refusal to instruct jury on a lesser included offense;
5. the Supreme Court of Florida's improper ex parte consideration of extra-record materials;
6. systematic exclusion of death-scrupled jurors;
7. improper overriding of jury's verdict of life imprisonment;
8. unconstitutionality of trial court overriding jury verdict of life and imposing a sentence of death;
9. improper restriction of mitigating circumstances;
10. refusal to sever counts;
11. improperly admitted prejudicial evidence;
12. improper closing argument;
13. unconstitutional aggravating evidence.

Petition for Writ of Habeas Corpus, *Dobbert v. Strickland*, 532 F.Supp. 545 (M.D. Fla.1982).

Paraphrased as follows, petitioner asserts seven claims on appeal:

1. The Florida Supreme Court's solicitation and collection of psychiatric, psychological and correctional reports concerning petitioner and other death row inmates during the pendency of their capital appeals violated the rights to due process, effective assistance of counsel, confrontation, and the prohibitions against cruel and unusual punishment and self-incrimination under the Fifth, Sixth, Eighth and Fourteenth Amendments (the so-called *Brown* issue);

2. The Florida Supreme Court's affirmance of the death sentence after ruling two of the four aggravating circumstances found by the state trial court inapplicable violated the Eighth and Fourteenth Amendments;

3. A. Imposition of the death sentence after the jury's recommendation of life violated the integrity of the jury trial, due process, and the prohibitions against double jeopardy and cruel and unusual punishment;

B. The procedure by which the jury recommendation was overridden violated due process and the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments;

4. The Florida courts refused to give independent weight to mitigating evidence in violation of the Eighth and Fourteenth Amendments;

5. The prosecutor's use of peremptory challenges to remove death-scrupled jurors from the panel was a deprivation of due process and violated the right to have a jury composed of a fair cross-section of the community under the Sixth and the Fourteenth Amendments;

6. The evidence at trial was insufficient to prove beyond a reasonable doubt the element of premeditation required for conviction of murder in the first degree.

Our recent en banc opinion in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.), *cert. denied*, — U.S. ——, 104 S.Ct. 201, 76 L.Ed.2d —— (1983), settled appellate issue one adversely to petitioner. *Ford* and the recent Supreme Court decision in *Barclay v.*

* Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Florida, — U.S. —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), control the decision as to issue two. Because the remaining contentions fail to present errors of constitutional magnitude, we affirm.

Background

In the spring of 1974, Dobbert was convicted in Circuit Court, Duval County, Florida, of the first degree murder of his nine-year-old daughter, second-degree murder of his seven-year-old son, child torture of his eleven-year-old son, and child abuse of his five-year-old daughter. Only the first degree murder conviction and sentence are challenged in the instant appeal.

Petitioner's conviction and sentence were affirmed by the Florida Supreme Court. *Dobbert v. State*, 328 So.2d 433 (Fla.1976). The United States Supreme Court granted certiorari on three issues not involved in the instant appeal and decided them all against Dobbert. *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Under the authority of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of Florida entered an order which vacated petitioner's death sentence and remanded the case to the trial judge for resentencing. The trial judge resentenced Dobbert to death, the Florida Supreme Court affirmed the new sentence, *Dobbert v. State*, 375 So.2d 1069 (Fla.1979), and the United States Supreme Court denied certiorari. *Dobbert v. Florida*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

Petitioner joined with 122 other death row inmates in a state habeas corpus petition challenging the Florida Supreme Court's alleged practice of receiving nonrecord information during the pendency of the appeals of capital cases. The Florida Supreme Court dismissed the petition with an extensive opinion. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981). The denial of certiorari by the United States Supreme Court fostered a dissenting opinion. *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). Dobbert thereafter mounted another collateral attack pursuant to Florida Rule of Criminal Procedure 3.850. Denial of relief was affirmed by the Supreme Court of Florida on January 28, 1982. *Dobbert v. State*, 409 So.2d 1053 (Fla.1982).

Scheduled for electrocution on February 2, 1982, petitioner filed the petition for writ of habeas corpus that is the basis of the instant appeal on January 27, 1982. The federal district court denied relief, and we granted a stay of execution by order, followed by an opinion. *Dobbert v. Strickland*, 670 F.2d 938 (11th Cir.1982).

1.

The Brown Issue

Lacking specific evidence that such materials were reviewed in his case, Dobbert attacks the Florida Supreme Court's alleged practice of receiving nonrecord materials concerning death row inmates during the pendency of their appeals. Our recent en banc decision in *Ford v. Strickland*, 696 F.2d at 809–11, considered and rejected this identical claim.

2.

Insufficiency of Evidence on Two Aggravating Circumstances

Under the Florida procedure by which a jury renders an advisory verdict as to sentence in a capital case, Dobbert's jury recommended life imprisonment. The trial court, however, sentenced Dobbert to death, finding evidentiary support for four statutory aggravating circumstances. On appeal, the Supreme Court of Florida ruled there was insufficient evidence to support two of the four circumstances: that Dobbert was under sentence of imprisonment when he committed the murder and that he created a great risk of death to many persons. *Dobbert v. State*, 375 So.2d at 1070. The court upheld the remaining two aggravating circumstances, specifically finding "the murder was committed to avoid lawful arrest and was especially heinous and cruel." *Id.*

At the time this case was submitted, petitioner argued that where the trial court relied on two aggravating circumstances for which there was insufficient evidentiary support, the Florida Supreme Court's affirmance of his death sentence was unconstitutional under *Henry v. Wainwright*, 661

F.2d 56 (5th Cir.1981) and *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980). *Stephens* has now been reversed by the Supreme Court, *Zant v. Stephens*, — U.S. ——, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Henry* has been vacated. *Wainwright v. Henry*, — U.S. ——, 103 S.Ct. 3566, 77 L.Ed.2d 1407 (1983).

Prior to the recent Supreme Court decisions, this Court had rejected this same basic contention in an en banc opinion, *Ford v. Strickland*, 696 F.2d at 1261–63, which held our decisions in *Stephens* and *Henry* inapplicable to a situation such as this reasoning:

> In any event, we think that *Stephens* and *Henry* are inapposite to the case at bar. This case involves consideration of neither unconstitutional nor nonstatutory aggravating evidence. That the evidence was insufficient to support two circumstances and one circumstance was based on the same aspect of the crime as another does not suggest that the sentencing court considered any extraneous or improper evidence. The sentencing jury and judge considered only evidence of facts which could properly be considered by them. This case is appreciably different from *Stephens* because there the jury may have considered evidence that it could not constitutionally consider. In this case, no evidence considered was inappropriate for consideration. The sentencing judge's erroneous classification of that evidence as the aggravating circumstances permitted by statute should not constitutionally infect the sentence. On all of the evidence before him, he reached the determination that the death sentence was appropriate.

In *Ford*, we upheld against constitutional attack a death sentence even though the trial judge relied on two aggravating circumstances without evidentiary support and one aggravating circumstance based on the same aspect of the crime as another, properly considered an aggravating circumstance.

The United States Supreme Court has also now rejected a similar contention in *Barclay v. Florida*, — U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). In *Barclay*, the Court upheld a death sentence even though the sentencing judge considered a nonstatutory aggravating circumstance in violation of state law. Thus, as in the present case, the trial judge relied on an invalid aggravating circumstance. In affirming the death sentence, the United States Supreme Court reasoned that the Florida Supreme Court could determine the improper aggravating circumstance did not affect the trial judge's decision since there were other proper aggravating circumstances. *Id.* at ——–——, 103 S.Ct. at 3427–28. *See also Zant v. Stephens*, — U.S. ——, ——–——, 103 S.Ct. 2733, 2749–50, 77 L.Ed.2d 235, 257–59 (1983).

[1] As in *Barclay* and *Ford*, the sentencing judge here found no mitigating circumstances and some appropriate statutory aggravating circumstances. The judge did not view as aggravating any constitutionally protected conduct. The Florida Supreme Court then followed what seems to be its consistent practice in cases of this kind: to affirm the death sentence if justified under a review of all the evidence and one or more validly found aggravating circumstances are present, even though one or more statutory grounds are not sufficiently shown. *Dobbert v. State*, 375 So.2d at 1071. As in *Barclay*, the Florida Supreme Court reviewed the sentence under the heightened standard of *Tedder v. State*, 322 So.2d 908 (Fla.1975), because the jury recommended life, concluding "the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person could differ." *Dobbert v. State*, 375 So.2d at 1071.

Thus, the trial court's imposition of the death sentence and the Florida Supreme Court's affirmance thereof were not arbitrary. The Florida courts satisfied the constitutional requirement by making an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, — U.S. at ——, 103 S.Ct. at 3428, *quoting Zant v. Stephens*, — U.S. ——, ——, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251 (1983) (emphasis in original).

3.

Imposition of the Death Sentence Following an Advisory Jury Verdict Recommending Life Imprisonment

In his third and fourth claims on appeal, Dobbert contends the trial judge's imposition of a death sentence following the jury's advisory life verdict is unconstitutional *per se* under *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and procedurally unconstitutional under *Tedder v. State*, 322 So.2d 908 (Fla.1975).

A.

Bullington is inapposite because in Missouri, the jury's sentencing decision is controlling. In that case, the defendant was convicted of capital murder and sentenced by the jury to life imprisonment. After a new trial, the second jury sentenced him to death. The Supreme Court held the Fifth Amendment's double jeopardy clause precluded imposition of a more severe sentence on retrial, analogizing the jury's sentencing function to its role in determining guilt or innocence.

[2] Under the Florida statute, however, the sentencing jury's verdict is merely advisory and not binding on the trial judge. The Supreme Court's approval of Florida's capital sentencing procedure, including the provision for judge sentencing preceded by jury recommendation, defuses by implication any charge that the failure of the sentencing judge to follow the jury's recommendation is unconstitutional. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976); *Dobbert v. Florida*, 432 U.S. 282, 294–97, 97 S.Ct. 2290, 2298–2300, 53 L.Ed.2d 344 (1977). Indeed, as Dobbert concedes, it is an open question whether jury participation in the penalty phase of a capital case is constitutionally required at all. *Lockett v. Ohio*, 438 U.S. 586, 609 n. 16, 98 S.Ct. 2954, 2967 n. 16, 57 L.Ed.2d 973 (1978); *Proffitt v. Florida*, 428 U.S. at 252, 96 S.Ct. at 2966.

B.

Pursuing a slightly different angle, petitioner claims that even though the system is constitutional, the procedures by which the death penalty was imposed in his case were unconstitutional. He relies on *Tedder v. State*, which holds a death sentence imposed after an advisory jury life verdict can be sustained only if supported by facts so "clear and convincing that no reasonable person could differ." 322 So.2d at 910.

When distilled, Dobbert's argument is both an extension of his position that the non-binding status of the jury's recommendation is unconstitutional *per se* coupled with an attack on the sufficiency of the evidence under *Tedder*. As to the former, this feature of the Florida capital sentencing statute is constitutional. *See Proffitt v. Florida*, 428 U.S. at 252, 96 S.Ct. at 2966. As to the latter, we have already held in Part 2, *supra*, that the fact that there was a lack of evidentiary support for two of the four aggravating circumstances relied on by the trial court does not render petitioner's sentence constitutionally infirm. *Ford v. Strickland*, 696 F.2d at 1259–61. We hold hereafter that mitigating evidence was not unconstitutionally restricted, *see* Part 4, *infra*. Review of the record under the *Tedder* standard reveals sufficient support for the ultimate conclusions of the state trial judge's detailed findings, the two opinions of the Florida Supreme Court and the United States Supreme Court's decision to defeat a constitutional attack on the death sentence as procedurally deficient.

4.

Weight Accorded Mitigating Evidence

Petitioner argues that although he was allowed to present such mitigating evidence as he desired in his sentencing hearing, the trial court violated *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982), by failing to give independent weight to evidence of his emotional disturbance and other nonstatutory mitigating circumstances.

[3] This argument fails because our analysis of the record reveals that both the order of the trial court and the decision of the Florida Supreme Court reflect consideration of all mitigating evidence put on by Dobbert, statutory and nonstatutory. *Dob-*

bert v. State, 375 So.2d at 1071. The identical concluding phrase employed by the trial court, "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances" has been held indicative of the sentencing judge's consideration of nonstatutory mitigating evidence. *Ford v. Strickland*, 696 F.2d at 813. Petitioner's suggestion that this rationale compels the conclusion that non-statutory aggravating circumstances were also considered is unavailing because the above phrase was not used in connection with the trial court's discussion of aggravating circumstances. The fact that the sentencing order does not refer to the specific types of non-statutory "mitigating" evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered. Whether particular evidence, such as the fact that Dobbert had a difficult childhood, is mitigating depends on the evidence in the case as a whole and the views of the sentencing and reviewing judges. What one person may view as mitigating, another may not. Merely because the Florida courts, operating through a properly drawn statute with appropriate standards to guide discretion, do not share petitioner's view of the evidence reveals no constitutional infirmity. *See Proffitt v. Florida*, 428 U.S. at 258–59, 96 S.Ct. at 2969–70.

5.

Use of Peremptory Challenges to Exclude Death-Scrupled Jurors

Petitioner claims the state used peremptory challenges at his trial to systematically exclude death-scrupled jurors from his panel in violation of his rights to due process and to a fair and impartial jury drawn from a cross-section of the community under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Although it also rejected this contention on the merits, the district court held first under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that this point is foreclosed from consideration in the federal forum due to Dobbert's failure to object at trial to the prosecutor's use of peremptory challenges. The Florida Supreme Court has recently reaffirmed the applicability of the waiver-by-failure-to-object rule to challenges to the composition of the jury panel. *Maggard v. State*, 399 So.2d 973, 975 (Fla.1981), *cert. denied*, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981).

[4] The applicability of *Sykes*' procedural default rule to the instant facts is not entirely clear because the Florida Supreme Court, in affirming the denial of relief to petitioner in a collateral attack under Fla.R.Crim.P. 3.850, both applied the rule *and* reached the merits. *Dobbert v. State*, 409 So.2d 1053 (Fla.1982). The trial court had previously denied the motion, also through an alternative ruling. A procedural default bars the consideration of the merits of an issue in federal court only when the state court itself applies the procedural default rule. *See Ulster County Court v. Allen*, 442 U.S. 140, 152, 99 S.Ct. 2213, 2222, 60 L.Ed.2d 777 (1979). Where the state court waives the procedural requirement and decides the case on the merits, federal review of the constitutional claim is not barred. *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982).

[5] Where the state court decision relies on both a procedural default and a lack of merit, the situation is unclear. One federal district court has held in a habeas corpus case that it was required to conduct a review on the merits under such circumstances. *Darden v. Wainwright*, 513 F.Supp. 947, 952 (M.D.Fla.1981). We have held, however, that where a state court clearly and correctly applies a procedural default rule, *Sykes* requires the federal court to abide by the state court's decision even though the state court discusses the merits as an alternate ground for rejecting a claim. *Ratcliff v. Estelle*, 597 F.2d 474, 478 (5th Cir.), *cert. denied* 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979). Appellate courts often decide an issue in the alternative with no intention of abandoning any available ground for decision. The problem here, however, is discerning whether the

waiver rule has been applied and the merits discussed only in the alternative, or whether the procedural ground is mentioned only in passing and the merits form the basis of the state court's decision. In this case, for example, the Florida Supreme Court first discusses the merits, then states, "Furthermore, we find that Dobbert has waived any right to challenge the jury based on the rationale of *Witherspoon* by his failure to object to the State's peremptory challenges to the jury panel." *Dobbert v. State*, 409 So.2d at 1057.

This approach by the state court might well give the federal court the option to refuse to review the merits of the issue because of a state court procedural default. Just as the federal district and state courts decided both issues, however, we examine them both on appeal.

[6, 7] Assuming applicability of the procedural default rule, petitioner argues that *Sykes'* cause and prejudice exception applies because it is "not at all clear that violations of *Witherspoon* are waivable" and because evidence of the pattern and practice was not available until after trial. These arguments fail for two reasons. *First*, *Witherspoon* dealt with the standard for dismissing jurors for cause based on their beliefs concerning the death penalty and not the systematic exclusion of jurors based on race through peremptory challenges addressed in *Swain*. Petitioner's novel attack on the state's use of peremptory challenges to exclude death-scrupled jurors rests on a synthesis of *Witherspoon* and *Swain*, and does not present a true *Witherspoon* claim so that the waivability of a pure *Witherspoon* claim is not properly before us. In any event, we have repeatedly held the contemporaneous objection rule constitutional with regard to challenges of the composition of jury panels, *Huffman v. Wainwright*, 651 F.2d 347, 349 (5th Cir. 1981), and Dobbert has presented no authority which stands for the proposition that *Sykes'* procedural default rule is inoperable in the *Witherspoon* context. *Second*, although the research study on which petitioner's claim is founded was completed after his trial, both *Witherspoon* and *Swain* were decided years before. It therefore cannot be said Dobbert lacked the tools to construct the instant constitutional claim at the time of trial. *Engle v. Isaac*, 456 U.S. 107, 129–34, 102 S.Ct. 1558, 1572–74, 71 L.Ed.2d 783 (1982).

[8] An examination of the merits reveals no constitutional error. We agree with the district court that *Witherspoon* and *Swain*, which address respectively the use of challenges for cause to exclude death-scrupled jurors and the use of peremptory challenges to exclude black jurors, have not been extended to the instant situation and are inapplicable. Dobbert's *Witherspoon/Swain* claim is therefore rejected on both procedural and substantive grounds.

6.

Sufficiency of the Evidence

[9] Petitioner alleges there was insufficient evidence to prove the element of premeditation to sustain his conviction for first degree murder. The district court opinion carefully and correctly applies *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and like the Florida Supreme Court, *Dobbert v. State*, 328 So.2d 433 (Fla.1976), *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), concludes there was ample evidence to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. There is no merit to this challenge to petitioner's conviction.

AFFIRMED.

WISDOM, Senior Circuit Judge, dissenting.

I respectfully dissent. When the state exacts death as the punishment for a crime, it must follow meticulously the procedures designed to safeguard against even a slight risk of improper imposition of this uniquely irreversible sentence.

The reversible error is that the prisoner's file, subject to review by the Florida Supreme Court, included nonrecord evidence. In the majority opinion it is characterized as "The Brown Issue". *See Brown v. Wain-*

wright, Fla.1981, 392 So.2d 1327, *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407. In *Brown* the petitioner and other Florida death row inmates joined in asking habeas relief on the ground that the Florida Supreme Court "engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal". That information includes presentence investigations, psychiatric evaluations and contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel. *Id.* at 1330. The court did not deny the existence of the practice, but stated: "Factors or information outside the record play no part in our sentence review role." *Id.* at 1332. Moreover, "the reading of non-record documents would [not] so affect members of this Court that they could not properly perform their assigned appellate functions". *Id.*

The majority perfunctorily dismisses the Brown issue: "Our recent en banc decision in *Ford v. Strickland*, [11 Cir.1983, 696 F.2d 804], considered and rejected this identical claim."

Ford is bad law [1] and flabby authority to treat as a binding precedent. The Court of Appeals for the Eleventh Circuit should reexamine its position on the issue raised in that case and raised again in this case. Stare decisis is not so powerful a doctrine that it should overcome justice and perpetuate error. Stare decisis is useful in providing stability and predictability in the law, particularly in the field of commercial law, but it is far less useful in constitutional law. The United States Supreme Court is dedicated to the thesis that "when convinced of former error, this Court has never felt constrained to follow precedent". *Smith v. Allwright*, 1944, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987. Here there is no long line of cases establishing precedent. There are just the enigmatic opinion in *Ford* and the impenetrable opinion in *Brown*. This Court should correct its error before it is snared by a net of its own making.

The irrelevancies in this case are not the nonrecord files the Florida Supreme Court has made a practice of requesting in death cases. They are an over-tender respect for the sensibilities of that court and a fear that too many prisoners in death row cells in Florida will have to be resentenced. But when the stakes are life and death for at least 123 men on death row,[2] "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and *appear* to be, based on reason...." *Gardner v. Florida*, 1977, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (plurality opinion) (emphasis added).

In *Gardner v. Florida*, the Supreme Court reversed a death sentence because a portion but not all of the presentence report had been disclosed to the defendant's counsel and, on the basis of the report, the district judge had rejected the jury's advisory verdict and sentenced the defendant to death. The plurality opinion in *Gardner* found that the sentencing procedure violated the due process clause of the fourteenth amendment. Notwithstanding the holding in *Gardner*, the Florida Supreme Court conceded in *Brown* that it followed the practice in capital cases of requesting nonrecord psychiatric, psychological, and post-sentence reports on petitioners. These reports were not shown nor were their contents made known to the petitioners or their attorneys.

As Chief Judge Godbold said in his dissenting opinion in *Ford*: "The rationale, if not the narrow holding of *Gardner v. Florida*, ... prohibits an appellate court from relying on, that is, using as a factor in its

1. I was not a member of the *Ford* panel and therefore could not express my disagreement with the holding of the en banc Court of Appeals for the Eleventh Circuit.

2. One hundred twenty-two death row inmates joined with Joseph Brown in the petition challenging the Florida court's practice. *Brown v. Wainwright*, Fla.1981, 392 So.2d 1327, *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407. The broad principle stated in *Ford* could apply to all of them.

decision, nonrecord information." 696 F.2d at 820. It is unclear whether the Florida Supreme Court has violated this principle. "The disparate views that the judges of this court have expressed about the import of *Brown* convincingly demonstrate the intractable ambiguity of the Florida Supreme Court's opinion." *Id.* at 821. According to the *Ford* majority, the Florida Supreme Court indicated in *Brown* that it did not use the extrinsic material. 696 F.2d at 804. Judge Godbold read *Brown* "differently". He construed the opinion as "not directly stat[ing] that it did not actually rely on nonrecord information". *Id.* at 821. Judge Johnson, also dissenting, found that "[t]he Florida Supreme Court has admitted the practice [of considering nonrecord information] but has attempted to justify its actions by drawing a fine distinction between capital sentence 'review' as defined by state law and constitutionally required 'supervisory standards' imposed by the United States Supreme Court." *Id.* at 872. Judge Kravitch, dissenting from the panel opinion, pointed out:

> The Florida court did not deny that it systematically requested and received nonrecord information concerning capital defendants, see *Brown v. Wainwright*, 392 So.2d at 1330, 1331; moreover it essentially admitted having used the information for *some* purpose by its statement that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards". *Id.* at 1333 n. 17. . . .
>
> The mystery that the Florida Supreme Court has chosen to leave unresolved concerning the purpose of its requests for and its use of nonrecord information only underscores the need for a complete factual record in this case.

Ford v. Strickland, 11 Cir.1982, 676 F.2d 434, 455.

Only blind faith can support a conclusion that there was no appearance of impropriety, for its stretches credulity past the breaking point to hold, as the majority effectively holds in this case, that the Florida Supreme Court consistently and secretly sought information that it intended not to use and that was, according to the court, "irrelevant". For the reasons eloquently and lucidly explained in the dissenting opinions in *Ford*,[3] I would hold that the Florida Supreme Court's practice of receiving nonrecord information must be held to violate the due process clause of the fourteenth amendment.

I agree with Judge Johnson's suggested remedy:

> [T]he only way to remedy this violation would be to direct the district court to grant the writ conditionally. The writ would become final in the event that the Florida Supreme Court does not grant petitioner a new direct review of his conviction and sentence. Either the new review must be undertaken completely without the benefit of nonrecord material, or, if the court decides to continue its practice, the new review must give petitioner and his counsel adequate notice of the use of nonrecord information, with adequate opportunity to comment on and challenge the material.

Ford v. Strickland, 696 F.2d at 874.

3. *See also Brown v. Wainwright*, 1981, 454 U.S. 1000, 1001, 102 S.Ct. 542, 543, 70 L.Ed.2d 407 (Marshall, J., dissenting from denial of certiorari). Justice Marshall pointedly asks: "If the Court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information?" Justice Marshall's opinion further notes that the practice of the Florida Supreme Court may also have resulted in violations of *Estelle v. Smith*, 1981, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359. I agree. In *Smith*, the Court held that the results of an in-custody psychiatric examination could not be used in the penalty phase of a trial for a capital crime when the defendant was neither given *Miranda* warnings before the examination nor permitted the assistance of counsel in deciding whether to undergo the examination. Dobbert apparently had neither warnings nor assistance of counsel in deciding to undergo the interviews that he contends the supreme court considered

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) **Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentance of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974. Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (5)(i).

Reviser's Note—1977:

Conforms internal references to editorial reassignment of subsections created by s. 9, ch. 72-724, Laws of Florida.

COUNTY OF EAU CLAIRE
STATE OF WISCONSIN

AFFIDAVIT

Ernest John Dobbert, III, being duly sworn, deposes and says:

1. I am the son of Ernest John Dobbert, Jr., who was convicted and sentenced to death in Jacksonville, Florida in April, 1974, for the murder of my sister, Kelly Ann Dobbert. I testified as a witness against my father at his trial. I did not testify truthfully about the cause of my sister Kelly's death at the trial.

2. On Sunday, January 31, 1982, I read in the newspaper that my father was to be executed within two days. After learning of my father's execution date, I called my close personal friend and lawyer, Paul Kelly, and asked him to help me correct my untrue testimony that was responsible for my father being convicted of murdering Kelly.

3. Some of the questions asked of me at trial by Mr. Shorstein, the Assistant State Attorney, are listed below. The answers in the left column are some of the answers given at trial that were false. The true answers are listed on the right under the column designated "Correct Answer."

Question: "Let me go back to the night before New Year's Eve. Did he [your father] do anything to Kelly the night before she died?" [T.T. 2113]

Answer at trial:	Correct Answer:
"Yes."	"No."

Question: "What did he do to her?" [T.T. 2113]

Answer at trial:	Correct Answer:
"Kicked her."	"Nothing."

The answers indicating that my father kicked Kelly the night before she died were untrue. My father did kick Kelly in much the way I described, but weeks before she died.

her [Kelly] the night she died?" [T.T. 2113]

Answer at trial:	Correct answer:
"Choked her."	"No."

All the answers indicating my father choked Kelly the night she died are untrue. He did not choke her that night, nor did he kill her. Her death was accidental.

4. I am making this affidavit because there are statements I made at trial that were untrue, and need correcting. I do not make this affidavit out of any great love for my father. I still have not forgiven him for the abuse that I (and my brother and sisters) suffered at his hands for the four years before Kelly died and I ran away. I have no desire to see him free. He should be in prison for the abuse to his children.

5. I read my testimony at trial again recently. Although it is accurate in parts, there are statements that are clearly false, and parts of the story came out in a way that is very misleading about what happened before Kelly's death. The story as it came out is just untrue. The trial testimony creates this story: The night before Kelly died, my father kicked her several times in the stomach. The next night, after she ate some soup, he choked her and she stopped moving. I listened to her heart, but couldn't hear a beat. My father then tried mouth to mouth resuscitation, but it didn't work.

What happened in reality was that the kicking incident occured long before the night Kelly died, more like two weeks before she died. The night she died, she was sitting in bed eating some soup. She started vomiting, and then choking on her own vomit and food. My father tried to give her mouth to mouth resuscitation, but it didn't work. Kelly was not killed by my father; she died accidentally, choking on food or vomit.

6. I'd like to explain a little more about why I think I testified as I did at the trial, and why I'm taking action to correct it now.

At the time of the trial I was thirteen years old. I was still deathly afraid of my father after all I'd been through and seen, and wanted to be sure he'd be locked up where I'd be safe from him. I was undergoing hypnosis in a psychologist's office in Wisconsin for about a year before the trial. (The therapy ended one month after the trial.) I was hypnotized approximately two times a week for a period of time, and then about once every week thereafter. At each session, I'd be hypnotized and then asked questions about my father and how he abused us. I was later kept heavily medicated on what I was told was thorazine, from 1972 to 1976, and then on other medication until 1978.

Although no one ever said it directly, I knew that my social worker, Mrs. Lenz, and other people on the staff at the children's home wanted me to testify that my father killed my sister. I looked up to these people and wanted desperately to please them -- they were good to me and concerned about me in a way I hadn't known for years. Mrs. Lenz, in particular, influenced me. I saw her almost every day for the period before the trial. She developed some emotional difficulties herself, and began to obsess about my father.

When I finally left the institutions in 1978 and came off the medication, I thought about what I had done in testifying that Kelly was murdered when she died accidentally. Although I knew I had done something wrong, I wasn't sure what, if anything, I wanted to do about it. After awhile,

I spoke to Paul Kelly, and asked him to locate and notify my father's attorneys to see what might be done. I now want it to be known that I did not testify truthfully at my father's trial, as this affidavit shows. My father did not kill Kelly.

ERNEST JOHN DOBBERT, III

Sworn to and subscribed to
before me this 12th day of
February, 1982.

Paul Lee Kelly
NOTARY PUBLIC

My commission ~~expires~~:
is permanent

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No. 83-6195

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ERNEST JOHN DOBBERT, JR.,

Petitioner,

- against -

CHARLES D. STRICKLAND, et al.,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Ernest John Dobbert, Jr., by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Florida State Prison, Starke, Florida. Mr. Dobbert's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

STEVEN L. WINTER
99 Hudson Street
New York, New York 10013

ATTORNEY FOR PETITIONER